

THE REGULATION OF THE LIMITED LIABILITY COMPANY WITH A SOLE PARTNER IN THE EUROPEAN UNION

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Abstract

The limited liability company with a sole partner has existed from the beginning in the most controversial corporate form. This fact contradicts the principles governing the body of legal entities in general and companies in particular.

The normative consecration of the sole proprietorship was made to the detriment of the economic enterprise based on the theory of the patrimony of affectation by finally opting for its grafting on the foot of the limited liability company due to the numerous practical advantages of operating this type of company.

This vision also characterizes the way the regulation of the limited liability companies with sole partner is made at the level of the European Union based on the provisions of the Council Directive 89/667 / EEC of Dec. 21st, 1989 on the company law in respect of the limited liability companies with a sole shareholder as amended by Council Directive 2006/99 / EC of November 20th, 2006.

Key words: associates, share capital, social shares, memorandum act, limited liability with a sole partner

JEL Classification: K12, K 22

I. INTRODUCTION

The limited liability company with sole partner, as well as any form of a company regulated by Law no. 31/1990 acquires legal personality from the moment it was established in compliance with the conditions established by law by being a new legal entity based on freewill.

Having its own legal personality, the limited liability company with a sole partner manifests itself on its own behalf and on its own account in terms of the legal relations. The owner of its own rights and obligations is distinct from those of its sole partner.

Thus, there was a transgression of the nature of society from the group of people, based on the type of activity activity to the enterprise, the sole proprietorship being considered the legal form that refers to the enterprises' very organization and functioning. Consequently, it is worth noting the concept of the new Civil Code regarding the legal person defined as an entity or form of organization which, by fulfilling the conditions required by law, is the holder of rights and obligations (according to Art. 25 paragraph. (2) of the Civil Code). The profound transformations of our private law have the same impact on the regulatory framework of the limited liability company with a sole partner as for any type of company. It is a concept that has become non-functional in itself from the point of view of the civil code as it was replaced by the professional notion.

In practice, this paradigm shift creates serious problems in establishing the group of companies, of those professionals who must comply with the obligation to register with the Trade Register in order to be able to fulfill their purpose for which they were established.

In our opinion, we consider that it is necessary to regulate much more rigorously the category of companies that are subject to registration in the trade register in order to avoid a series of inaccuracies and inconsistencies that are likely to be sanctioned by law. At present, we consider that the object of activity mentioned in the constitutive act, which must be part of the provisions of the CANE code, can be considered as a criterion for determining the category of companies operating an economic enterprise.

In terms of the limited liability company with sole partner, the sole proprietorship influences the manner of the foundation, the organization, the functioning and the abolition of this type of company.

Law no. 31/1990, as well as the European norm in the field, provide the two ways of establishing the limited liability company with a sole partner namely the original sole proprietorship – a situation in which the company with sole partner is established as well as the derived unipersonality which intervenes during the existence of the society by reuniting all the social parts under the management of a single associate.

II. THE ANALYSIS OF THE EUROPEAN UNION'S REGULATIONS REGARDING THE LIMITED LIABILITY COMPANY

As a result of a need imposed by the economic situation, the 1980s were marked by a concern for Community regulation of the small and medium-sized enterprises, the adoption of the measures in order to promote their establishment and development as well as the existence of a Commission Action Program for small and medium-sized enterprises which was approved by the EU Council on November 3rd, 1986 (i.e. the Council Decision 89/490 / EEC of July 28th, 1989).

All these efforts resulted in the adoption on December 21st, 1989 of the Twelfth Company Law Directive on Limited Liability Companies with a Sole partner (i.e. the Directive 89/667 / EEC was published in OJL 395 on December 30th, 1989). Throughout time, the text of the Directive has undergone significant changes several times due to certain reasons such as clarity and rationalization. After twenty years, the Directive 2009/102 / EC of the European Parliament and of the Council on September 16th, 2009 on the company law regarding the limited liability companies with a sole partner (i.e. the Directive 2009/102 /EC) was published in *OJL 258 of October 1st, 2009* repealing the Directive 89/667 / EEC (i.e. Art. 9 of Directive 2009/102 /EC).

The European regulation of the sole proprietorship aimed at creating a framework conducive for the small and medium-sized enterprises in order to carry out their activity within a corporate form which would allow them to separate the social patrimony from the personal patrimony of the entrepreneur based on limiting the latter's liability for debts. This fact results from the economic activity in the amount of its contribution to the share capital. Moreover, the social patrimony provides the third parties with sufficient guarantees and allows both its management and its transmission in a harmonized framework (Commission of the European Communities, 1988, p.21).

The adoption of the directive harmonized the regulation of this type of company within the internal market as a result of a concise and comprehensive wording in accordance with the specific legislation of the Member States based on the differences in terms of the company or legal person at the national level. (C., Gheorghe, 2003 p.128).

The scope of the regulation of the directive is extended thus targeting any type of sole proprietorship - either with a limited liability or a joint stock (Art. 6 of the Directive), the public or private enterprises without legal personality that are organized in the form of a patrimony of affectation (NU AM INTELES EXACT AICI LA CE VA REFERITI). In the latter case, which is specific only for Portugal, the Member State is not constrained to regulate the sole proprietorship provided that the national rules of such a limited liability undertaking the offer of the third parties and their associates "guarantees the equivalent to those required by this Directive and other provisions." This fact is applicable to the companies referred to in Article 1st (i.e. Article 7 of the Directive).

According to the above mentioned directive, a sole proprietorship may be incorporated as such or may be incorporated in the process provided a single person brings together all the shares issued by the company (i.e. Article 2 (1) of the Directive).

In spite of the fact that the main objective of the European norm is to protect small businesses, the directive does not restrict the scope of those individuals who can acquire the status of sole partner. The partner can be both a regular individual and a legal person, yet he is subject to certain restrictive conditions regarding groups of societies (N. Eyran-Charrière, 2002, p.167). At the same time, as shown in the doctrine, by establishing a sole proprietorship, an entrepreneur can indirectly set up a multitude of patrimonies affected by the development of its various activities which may result in the form of distinct subjects of law (C., Gheorghe, 2003, p.129).

From the point of view of setting up a group of companies as well as in the absence of those rules on the harmonization of group rules, Member States may adopt a series of legislative measures in accordance with the national characteristics. In this respect, certain internal regulations may be adopted which may limit the situations in which a natural or legal individual holds the status of sole shareholder of several companies especially when that particular legal individual concerned is the very sole proprietor. The document also mentions the fact that Member States may impose restrictions on those sole proprietorships with limited liability or even prohibit the limitation of the sole shareholder's liability for the social debts. Moreover, national legislation may lay down certain conditions in order to cover the risks that may arise from the fact that a single person owns all the shares or shares issued by the company. This situation could lead to the non-fulfillment of the obligation to fully pay the subscribed capita as well as to the decapitalization of these sole proprietorships. (See paragraph 5 of the explanatory memorandum in conjunction with Article 2 (2) of the Directive).

The same synthetic spirit characterizes the regulations regarding the functioning of the sole proprietorship that provide a minimum of harmonization measures that aim at protecting the third parties and their associates (J.Luc y, 2002, p.46; Y.Reinhard, S.Dana-Demaret, F.Serras, 1993, p.437).

Thus, in order to inform the third parties that a single individual - natural or legal - owns all the shares or the shares issued by the company, a number of publicity formalities must be completed (See paragraph (6) of the explanatory memorandum). The reasons in conjunction with Article 3 of the Directive regarding this situation and the identity of the sole shareholder "by mentioning them in a register accessible to the public," are organized by a public authority or even by the company itself in accordance with the provisions of Directive 68/151 / EEC (A rt.3, para. (1) and (2) of Directive 68/151 / EEC).

Given that the sole shareholder is the governing body of the sole proprietorship and has the same prerogatives as the general meeting of associates in multipurpose partnerships, its decisions ruling instead of the decisions of the general meeting with the same effects on the life of the company must be " entered into the minutes or in writing "in order to protect the third parties (A rt.4, paragraph (1) and (2) of the Directive) . It is interesting that in spite of the fact that the directive refers to the duties of the general meeting , it fails to name them specifically as whether their partner must exercise his direct and immediate decision making powers or delegate partially or totally the others (N. Eyran-Charrière, 2002 , p.168).

The obligation to conclude contracts between the sole proprietorship and the sole shareholder exclusively in a written form or, possibly, within a report (A rt.5, paragraph (1) of the directive) is also mentioned as such. Consequently, the Member States may exempt contracts covering the company's " current operations" that were made under the regular conditions in order to improve the company's business conduct for the excessive formalism can be an obstacle (A rt.5, par. (2) of Directive) .

It should be noted that the European legislator does not provide any sanctions in case of a non-compliance with the written form by leaving it to the Member States to establish such sanctions.

We must emphasize the fact that the directive does not set a minimum amount of the share capital of the sole proprietorship with limited liability. This may call into question the very nature of the share capital, but it may especially to the impossibility of effectively insuring the limited liability of the sole shareholder given absence of a reference element (EG, Leuciuc, 2019, p. 37) .

The absence of this provision can lead to an uncertainty for small enterprises whose financial capacity is often insufficient in order to sustain an economic activity, especially in those times that are characterized by economic difficulties (N. Eyran-Charrière, 2002 , p.169) .

As far as the liability of the sole shareholder is concerned, the Directive does not contain precise provisions, yet it suggests the possible manifestation of specific regulation issued by each Member State which " in exceptional cases, imposes the liability of the entrepreneur on the obligations of his company " (See paragraph (4) from the explanatory memorandum as part of the Directive) .

Finally, the directive fails to regulate the procedure for the termination of the sole proprietorships. Consequently, each Member State must regulate those matters.

Despite its shortcomings, the Directive 2009/102 /E which is considered to be "the most elliptical of directives" (C.Gheorghe, 2002 , p.128) is a huge step forward in the process of legislative harmonization at the European level in terms of the generalization of the sole proprietorship . Inspired by the most advanced national regulations in the field of sole proprietorships, the directive contributes to the elaboration of an European company law (A. Carnelutti, November 1990, no. 313-314, p.5) .

The practical value of the sole proprietorship is demonstrated by the fact that the vast majority of national laws regulate this type of corporate form. They can be found in other international (regional) normative acts such as the Treaty on the Organization for the Harmonization in Africa of the Business Law (OHADA) that was signed at Port-Louis on October 17th, 1993.

III. CONCLUSIONS

As shown in the doctrine, the limited liability company marks a higher stage in the evolution of the exploitation of the economic enterprise by a single entrepreneur (SLCristea, 2012 , p.120) . The form of the limited liability company that is a subject of law distinct from the entrepreneur who constitutes it, offers him the possibility of limiting his liability for debts which results from the economic activity corresponding to the amount of his contribution to the share capital.

However, the entrepreneur who organizes his economic activity in the form of the individual enterprise or the authorized natural individual, is unlimitedly liable for the obligations assumed in the context of this activity taking into account the fact that we refer to a single patrimony which is that of the entrepreneur himself (C.Lefter, 2003 , p.18) .

Being an entity that is organized in compliance with those norms corresponding to the legal status, the limited liability company has a well-established internal structure which facilitates the fulfillment of all functions that are inherent in such a subject of law which are adjusted to the specificity of the unipersonality that is unknown to the simplicity of the individual enterprise." (C. Lefter, 2003 , p.18) .

Moreover, the subjectivity of the sole proprietorship is likely to solve other issues such as those arising from the cessation of the existence of the sole shareholder. Thus, the succession mass and not the patrimonial

asset is highly likely to be considered as the social parts which no longer risk being divided. The activity of the enterprise can continue with the successors of the sole partner including the minors, too (P. Tosi, 1996, p.101) .

The corporate structure facilitates the change of the legal physiognomy of the society from a unipersonal society into a pluripersonal form with the preservation of the same legal personality (J.Hugot, J.Richard, 1985 , p.85) . Basically, the multi-personality implies a new internal restructuring of the society itself and, consequently, a modification of the constitutive act which can be anticipated by drafting a “polyvalent ”status (I. Voica, 2005, p.340).

At present, in the vast majority of states, as well as at the level of the European Union, the sole proprietorship is shaped in terms of the limited liability company which is a corporate form intended with predilection to carry out small-scale activities with a low turnover. However, the current trends generated by the dynamics of economic life and marked by an accentuated globalization, impose other forms of a sole proprietorship which is much more adapted to the changes that occur (N. Ezran-Carriere, 2002 , pp.431-436) . An eloquent example is the simplified sole joint stock company – SASU which is regulated by the French law.

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